

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

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IN THE OFFICE OF
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In re:) 1988 OAL Determination No. 4
Request for Regulatory)
Determination filed by) [Docket No. 87-010]
Dr. Norman C. Murphy,)
concerning the Board of)
Prison Terms' policy of)
excluding independent)
psychiatric and psycho-)
logical reports from)
parole consideration)
hearings for prisoners)
serving an indeterminate)
sentence¹)
March 16, 1988
Determination Pursuant to
Government Code Section
11347.5; Title 1,
California Code of Regulations
Chapter 1, Article 2

Determination by:


JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether the Board of Prison Terms' policy of excluding independent psychiatric and psychological reports from parole consideration hearings for prisoners serving an indeterminate sentence is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the above-noted policy is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

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THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine³ whether the Board of Prison Terms' ("Board") policy of excluding independent psychiatric and psychological reports offered at parole consideration hearings for prisoners serving an indeterminate sentence⁴ ("exclusion policy") is a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore violates Government Code section 11347.5, subdivision (a).⁵

THE DECISION 6,7,8,9

The Office of Administrative Law finds that the Board's exclusion policy (1) is subject to the requirements of the APA,¹⁰ (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a).

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I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

On July 1, 1977, the Community Release Board succeeded the Adult Authority and the California Women's Board of Terms and Paroles, which were abolished.¹¹ On January 1, 1980, the Community Release Board was renamed the "Board of Prison Terms."¹² The Board of Prison Terms meets periodically concerning parole matters at each prison.¹³

Authority ¹⁴

Penal Code sections 5076.1 and 5077 provide that the Board shall hear parole applications and shall determine parole length, conditions, and whether revocation is appropriate.

Penal Code section 5076.2, subdivision (a), provides in part that:

"Any rules and regulations, including any resolutions and policy statements, promulgated by the Board of Prison Terms, shall be promulgated and filed pursuant to [the APA]" [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."¹⁵ Since the Board is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.¹⁶

In any event, subdivision (a) of Penal Code section 5076.2, cited above, specifies that the Board's rulemaking is subject to the APA.

Background

The following undisputed facts and circumstances have given rise to the present Determination.

In a memorandum dated April 3, 1987, to Frank Bisignano, who is serving an indeterminate sentence in a state prison, the Department of Corrections advised Mr. Bisignano that "the reports and testing done on you by Dr. Murphy will not be allowed to be presented to the [Board], Per [Board's] policy that no outside psych reports or testing will be allowed to be presented to the [Board]."¹⁷ (Emphasis added.)

On June 1, 1987, Dr. Norman C. Murphy, Ph.D. ("Requester"), a licensed psychologist, filed a Request for Determination with OAL. Dr. Murphy stated in his Request that:

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"Although going through a rigorous interviewing, testing, analysis of other reports and documents, reading of pertinent materials, and rendering of a report on the psychological evaluations and other materials as well as a lengthy psychological report on Mr. Bisignano, the [Board] through the Department of Corrections refused to allow my reports to be seen by the [Board]."

One public comment was received concerning this Determination from Paul W. Comiskey, Esq. Mr. Comiskey stated that he also had tried to introduce an evaluation report from a private psychologist at a parole consideration hearing on behalf of a prisoner at a different prison. These reports were returned to Mr. Comiskey and he was told that "the Board would not accept them because of a policy they had adopted." (Emphasis added.) Upon asking where this policy existed in written form, the Board responded in a letter to Mr. Comiskey, dated May 18, 1987,

". . . You have requested a copy of the Board's policy regarding its consideration of psychiatric evaluations by [an] independent psychiatrist retained by a prisoner.

"Please find enclosed a copy of the minutes of the Board's Executive Meeting of June 6, 1986, which includes documentation of the Board's adoption of this policy."¹⁸ [Emphasis added.]

The minutes of the June 6, 1986, meeting read as follows:

"B. Prisoner's Counsel Bringing in Outside Psychiatrists - Albert Leddy.

MOTION: MEMBER LEDDY MADE A MOTION THAT THE BOARD ADOPT A POLICY OF NOT ACCEPTING REPORTS FROM PRIVATE PSYCHIATRISTS AT LIFER HEARINGS. MEMBER ACETO SECONDED THE MOTION.

"Discussion: Mr. Brown concurred with Member Leddy that allowing outside psychiatrists' reports does pose an equal protection problem for those inmates who cannot afford to hire outside psychiatrists.^[19] Mr. Brown further stated that he didn't see any legal problem with adopting such a policy.

THE MOTION WAS VOTED UPON AND UNANIMOUSLY CARRIED."

[Original emphasis and capitalization.]²⁰

The Board chose not to submit a Response to OAL concerning this Request for Determination. The Board has, however,

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begun the formal process of adopting a regulation (proposed Title 15, CCR, section 2239) in order to codify the challenged rule.²¹

II. DISPOSITIVE ISSUES

There are two main issues before us:²²

(1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342, subdivision (b) defines "regulation" as:

". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

(a) "No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

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First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

With respect to the Board's exclusion policy, the answer to both parts of this inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²³ It has been judicially held that "rules significantly affecting the male prison population" are of "general application."²⁴ The Board's exclusion policy is just such a rule. It is intended to apply to all members of a class, i.e., all prisoners serving an indeterminate sentence with possibility of parole.

The Board's exclusion policy also meets the second test of a "regulation." The policy implements and interprets Penal Code section 3043.5, which provides in part:

"(b) Any person interested in the grant or denial of parole to any prisoner in a state prison shall have the right to submit a statement of views in support of or in opposition to the granting of parole. The board, in deciding whether to release the person on parole, shall review all information received from the public" [Emphasis added.]

The Board's exclusion policy also implements and interprets the following regulation sections of Title 15 of the CCR:

"2249. Prisoner Presentation of Documents.

"A prisoner shall have the right to present relevant documents to the hearing panel. . . . They may cover any relevant matters such as mitigating circumstances, disputed facts or release planning. . . . [Emphasis added.]

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"2281. Determination of Suitability.

"(b) Information Considered. All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's: . . . past and present mental state; . . . and any other information which bears on the prisoner's suitability for release. . . ." [Emphasis added.]

The Commenter asserts that the Board's exclusion policy also implements, interprets or makes specific, Title 15, CCR, section 2256. Section 2256 provides in part :

"2256. Attorney.

"(a) General. A prisoner or parolee may be represented by an attorney at specific hearings. . . ."

The Commenter stated that he, as an attorney representing a prisoner at a life parole consideration hearing, tried to introduce an independent psychological evaluation report to the Board. As stated previously, this report was excluded by the Board from consideration because it was against the Board's policy, the challenged rule herein.

We agree with this assertion by the Commenter. The Board's exclusion policy supplements section 2256 by stating in substance that even though a prisoner may be represented by an attorney in a specific hearing, the attorney is limited to what he or she may submit, e.g., may not submit for consideration an independent psychiatric or psychological evaluation to the Board in a life parole consideration hearing.

WE THEREFORE CONCLUDE THAT THE BOARD'S EXCLUSION POLICY IS A "REGULATION" AS DEFINED BY GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.²⁵ None of the recognized exceptions (set out in note 25), however, apply to the Board's exclusion policy.

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WE CONCLUDE THAT NONE OF THE RECOGNIZED EXCEPTIONS APPLY TO THE BOARD'S EXCLUSION POLICY.

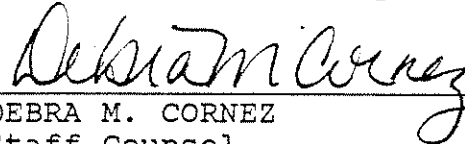
III. CONCLUSION

For the reasons set forth above, OAL finds that the Board's policy, which excludes independent psychiatric and psychological reports from parole consideration hearings, is (1) subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a).

DATE: March 16, 1988



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- 1 This Request was filed by Norman C. Murphy, Ph.D., 256 N. Chorro, #12, San Luis Obispo, CA 93402, (805) 546-2513. The Board of Prison Terms was represented by Ron E. Koenig, Chairman, and James A. Browning, Jr., Staff Attorney, 545 Downtown Plaza, Suite 200, Sacramento, CA 95814, (916) 322-6729.

- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396 n. 5, 211 Cal.Rptr. 758, 764 n. 5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute.

- 3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121(a) provides:

"Determination" means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as

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a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the Act." [Emphasis added.]

4 Penal Code section 1168, subdivision (b) provides for sentencing to state prison without a fixed term or duration of the period of imprisonment. This is called "indeterminate sentencing." On July 1, 1977, California's determinate sentencing law, Penal Code section 1170, went into effect. It basically prescribes three specific time periods from which the court must choose in sentencing a person convicted of a particular crime to state prison. For a general discussion and history of both determinate and indeterminate sentencing, see In re Monigold (1983) 139 Cal.App.3d 485, 188 Cal.Rptr. 698.

5 Government Code section 11347.5 (as amended by Stats. 1987, c. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

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4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]

- 6 As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

- 7 A comment concerning this Request was received from Paul W. Comiskey, Attorney-at-Law, 1317 Eighteenth Street, San Francisco, CA 94107, (415) 824-1070. This comment was considered in making this Determination. The Board chose not to submit a Response to the Request.

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In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected agencies to submit responses. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

- 8 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (emphasis added; Gov. Code sec. 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute).
- 9 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on page 1.
- 10 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 11 Stats. 1976, ch. 1139.
- 12 Stats. 1979, ch. 255.
- 13 Penal Code sections 5076.1 and 5077.
- 14 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

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The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 15 Government Code section 11342, subdivision (a). See Government Code sections 11343; 11346. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
- 16 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 17 Request for Determination, Attachment No. 3 (unnumbered).
- 18 Even though the Board's letter to Mr. Comiskey and the Board's minutes of the June 6, 1986, meeting, refer to the exclusion of "psychiatric evaluations by independent psychiatrist (emphasis added; see letter)," and "reports from private psychiatrists (emphasis added; see minutes)," the Board is clearly applying the Policy to independent psychologists and their reports as well, e.g., the Requester is a licensed psychologist and the evaluation report introduced by Mr. Comiskey was prepared by a psychologist.
- 19 We need not address the issue of whether the Board is correct in stating the need for this policy based on a possible

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"equal protection" problem. "Necessity" is one of the six substantive standards that OAL uses when reviewing a proposed regulation pursuant to Government Code section 11349.1, not when OAL reviews an alleged "underground regulation" pursuant to Government Code section 11347.5. See note 14, supra.

20 See comment from Paul Comiskey, Attachment No. 3 (unnumbered).

21 Proposed section 2239 concerns the presentation or consideration of non-institutional psychiatric and psychological reports in life parole consideration hearings. Notice of the proposed regulation was submitted to OAL on January 25, 1988 (OAL file number Z88-0125-03). It was published in the California Regulatory Notice Register 88, No. 7-Z, page 432, on February 12, 1988. The proposed regulation reads as follows:

"2239. Non-institutional Psychiatric Testimony at Hearings

Reports prepared by psychiatrists, psychologists, or other mental health professionals, except those prepared by, or under the direction of Department of Corrections mental health professionals, other state or Federal correctional mental health professionals, or in the case of life prisoners transferred pursuant to Penal Code section 2684, by State Department of Mental Health mental health professionals, shall not be presented [sic], or considered by panels in life parole consideration hearings." [Original underlining.]

We applaud the Board's efforts in moving to codify the challenged rule.

22 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

23 Roth v. Department of Veteran Affairs (1980) 110 Cal.App. 3d 622, 167 Cal.Rptr. 552.

24 Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.

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Rptr. 122.

25 The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning APA

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exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations (available from OAL, (916) 323-6225) is a helpful guide for locating such information.